



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 8, 2008

Mr. Gaines West
West, Webb, Allbritton & Gentry, P.C.
1515 Emerald Plaza
College Station, Texas 77845-1515

OR2008-09235

Dear Mr. West:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 315193.

The Arts Council of Brazos Valley (the "council"), which you represent, received a request for three categories of information, specifically (1) all council board meeting minutes, including motions and resolutions considered, rejected, or passed, from May 2006 to April 3, 2008, (2) a list of all reimbursements or payments made by the council to three specified board members from May 2006 to March 31, 2008, and (3) any communications sent to local media, and the authorization from the council's board, executive director, or the City of College Station, requesting that the media not use a specified name for the arts center. You state that the council has released the majority of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.136 of the Government Code and privileged under Texas Rule of Evidence 503.¹ We have considered your arguments and reviewed the submitted information.

Initially, we note that the submitted information includes minutes from meetings of the council's board of directors. The minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code § 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee). Although you state

¹While you cite section 552.137 of the Government Code for your argument to withhold portions of Bates-stamped page numbers 140 and 141, we understand you to raise section 552.107 of the Government Code, as section 552.107 is the proper exception for the substance of your argument.

that anytime the council discussed recommendations of its legal counsel or otherwise communicated with its legal counsel, these discussions were made in executive sessions, upon review, we find that the submitted minutes are not minutes of closed meetings. *See id.* §§ 551.101-.104.² As a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the council must release the submitted meeting minutes.

We also note that section 552.022 of the Government Code is applicable to some of the remaining information. Section 552.022(a)(3) provides for required public disclosure of “information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]” Gov’t Code § 552.022(a)(3). We have marked the information that is subject to section 552.022. The council must also release this information unless it is expressly confidential under other law. Sections 552.103 and 552.107 of the Government Code, which you raise, are discretionary exceptions to disclosure that protect a governmental body’s interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov’t Code § 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov’t Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally). As such, sections 552.103 and 552.107 are not “other law” that make information confidential for the purposes of section 552.022. Therefore, the council may not withhold the information that is subject to section 552.022 under section 552.103 or section 552.107. You also claim, however, that Texas Rule of Evidence 503 is applicable to some of submitted information subject to section 552.022. The Texas Supreme Court has held that the Texas Rules of Evidence are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will determine whether rule 503 is applicable to the information that is subject to section 552.022.

Texas Rule of Evidence 503 enacts the attorney-client privilege and provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

²*See* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether governmental body may withhold such information under statutory predecessor to Gov’t Code § 552.101); *see also* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act); Open Records Decision No. 60 (1974) (closed meeting minutes are confidential under predecessor to section 552.104).

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You contend that some of the information on page 45 of the submitted information is protected by the attorney-client privilege. You have not sufficiently demonstrated, however, that the information you have marked either constitutes or reveals a communication. Therefore, the council may not withhold the information you have marked on page 45 under rule 503 of the Texas Rules of Evidence.

Next, section 552.103 of the Government Code provides in relevant part as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or

employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.³ Open Records Decision No. 555 (1990). However, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). On the other hand, when the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (investigatory file

³In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

may be withheld if governmental body's attorney determines that it should be withheld pursuant to Gov't Code § 552.103 and that litigation is "reasonably likely to result").

You inform us that the information you have marked on page 43 relates to a possible civil action against the council's former executive director involving past finances of the council. You state that the council served written notice of potential claims against the former director before the instant request was received. You also state and provide documentation showing that prior to the date the council received the instant request for information, the council's attorney and the former director had entered into a Rule 11 Agreement to allow for the attorney's Rule 202 deposition. Further, you state that the information you seek to withhold on page 43 relates to the subject of the Rule 202 deposition. Based on your representations and our review of the submitted information, we conclude that the council reasonably anticipated litigation on the date the request was received. Thus, the council may withhold the information you have marked on page 43 pursuant to section 552.103 of the Government Code. However, none of the remaining information may be withheld on this basis.

We note, however, that once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses the doctrine of common-law privacy and excepts from public disclosure private information about an individual if the information (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is excepted from required public disclosure. *See* Open Records Decision Nos. 600 (1992), 545 (1990), 523 (1989) (individual's mortgage payments, assets, bills, and credit history).

You state that page 60 of the submitted information contains private financial information of a council board member. You further state this information does not constitute a record of council business or a transaction between the board member and the council. Based on your representations and our review, we conclude that the council must withhold the information we have marked on page 60 under section 552.101 of the Government Code in conjunction with common-law privacy.

Next, section 552.136 of the Government Code states that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). Accordingly, the council must withhold the credit card numbers we have marked under section 552.136 of the Government Code. However, none of the remaining information may be withheld on that basis.

Finally, we note that some of the remaining information is protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the council may withhold the information you have marked on page 43 under section 552.103 of the Government Code. The council must withhold the information we have marked on page 60 under section 552.101 of the Government Code in conjunction with common-law privacy. The council must also withhold the credit card numbers we have marked under section 552.136 of the Government Code. The remaining information must be released, but any copyrighted information may only be released in accordance with copyright law.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body

will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Katherine M. Kroll
Assistant Attorney General
Open Records Division

KMK/eeg

Ref: ID# 315193

Enc. Submitted documents

c: Ms. Linda Chateau
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(w/o enclosures)